Tenth Annual GAL/CASA State Conference

"Going the Extra Mile"

Saturday, October 21, 2006

Legal Update

Legislation Effective July 1, 2006

- CHINS factfinding hearings shall be completed by the juvenile court not more than sixty (60) days after the CHINS petition is filed. The court may extend the time to complete the factfinding hearing for an additional sixty (60) days if all parties consent. I.C. 31-34-11-1. (SEA 139)
- The CHINS dispositional hearing shall be completed not more than thirty (30) days after the CHINS adjudication. I.C. 31-34-19-1 (SEA 139)
- "Wardship" is defined as follows:

  (a) "Wardship", for purposes of the juvenile law, means the responsibility for temporary care and custody of a child by transferring the rights and obligations from the child's parent, guardian, or custodian to the person granted wardship. Except to the extent a right or an obligation is specifically addressed in the court order establishing wardship, the rights and obligations of the person granted wardship include making decisions concerning the:
  (1) physical custody of the child;
  (2) care and supervision of the child;
  (3) child's visitation with parents, relatives, or other individuals; and
  (4) medical care and treatment of the child.
  (b) "Wardship" does not apply to requirements for consenting to an adoption under IC 31-19-9.

  I.C. 31-9-2-134.5. (SEA 139)
- Progress reports are required to be filed by DCS every three (3) months after the dispositional decree is entered. I.C. 31-34-21-1(b). (SEA 139)
- Foster parents may have a copy of the report for the periodic case review prepared by DCS unless the court determines on the record that the report contains information that should not be released to the foster parent. I.C. 31-34-22-2. (SEA 139)

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- Except for hearings required under I.C. 31-35-2-4.5, whenever a hearing is requested on a petition for termination of the parent-child relationship is requested, the court shall complete the hearing on the petition not more than one hundred eighty (180) days after the petition is filed. I.C. 31-35-2-6(2).

Case Law

Delinquency

In K.S. v. State, 849 N.E.2d 538 (Ind. 2006), a delinquency probation violation case, the child appealed his disposition of wardship to the Department of Correction for six months. The probation violation involved physical aggression by the child against his sister, in which the mother intervened. On appeal the child argued, inter alia, that the court erred in failing to appoint a guardian ad litem for him. The child claimed that his mother had a conflict of interest because she was the parent of the victim. The Court stated that the parent of an alleged juvenile delinquent does not have a conflict of interest by virtue of being a parent of both the juvenile and the victim. Id. at 543, citing Whipple v. State, 523 N.E.2d 1363, 1369-70 (Ind. 1988). The Court opined that the juvenile court is well within its discretion when it decides not to appoint a guardian ad litem to a juvenile delinquent whose mother does not have a conflict of interest. Id. The Court further noted that the child was represented by counsel hired to protect his best interests, and counsel was eligible to be appointed guardian ad litem pursuant to IC 31-32-3-3 in the event the court chose to appoint one. Id.

In In Re R. L. H., 831 N.E. 2d 250, 257 (Ind. Ct. App. 2005), the Court noted that IC 12-26-8-1 et. seq. requires the appointment of a guardian ad litem or CASA and outlines the duties of the guardian ad litem/CASA. The commitments were reversed due to failure to follow statutory procedures.

Dissolution of Marriage

In J.M. v. N.M. , 844 N.E. 2d 590 (Ind.Ct. App. 2006), a dissolution of marriage case, the father appealed the trial court's order restricting his parenting time to supervised parenting time by a counseling service. The parties had agreed to the appointment of a guardian ad litem in a provisional order. The parties also agreed to binding arbitration pursuant to the Family Law Arbitration Statute, IC 34-57-4-1 et seq. The guardian ad litem testified, introduced her report as a exhibit, and cross examined witnesses at the two day hearing. Before the hearing, the father objected to the participation by the guardian ad litem in the proceedings, which objection was overruled. The guardian ad litem's report, which was submitted at the hearing, recommended that the father have therapeutically supervised parenting time and that he undergo a psychological evaluation, including a drug and alcohol assessment. In his appellate claim that the decree regarding parenting time must be reversed, the father argued that the guardian ad litem was erroneously allowed to examine and cross-examine witnesses and that there was a lack of statutary authority for this role.

The Court disagreed, citing the guardian ad litem's statutory role (IC 31-9-2-50), the appointment statute (IC 31-15-6-1), the requirement to represent and protect the best interests of the child (IC 31-15-16-3), the guardian ad litem's role as officer of the court (IC 31-15-6-7), and the ability of the guardian ad litem to subpoena witnesses and present evidence (IC 31-15-6-7) and be represented by counsel (IC 31-15-6-6). The Court also cited Carrasco v. Grubb, 824 N.E.2d 705, 710 (Ind. Ct. App. 2005), *trans. denied* and Deasy Leas v. Leas, 693 N.E. 2d 90, 93 (Ind. Ct. App 1998), *trans. denied* for the holding that the guardian ad litem is a party to the proceedings. J.M. at 601. The Court concluded that the guardian ad litem's participation in the arbitration hearing was within statutory authority and the trial court had not abused its discretion. Id.

The Court also found no merit in the father's argument that the guardian ad litem's presence during the hearing was barred by the separation of witnesses order. Id. The Court also rejected the father's contention that the guardian ad litem's alleged post-arbitration questioning of father's witness rendered the guardian ad litem's participation in the arbitration hearing improper because the father failed to show any prejudice he suffered. Id. Lastly, the Court disagreed with the father's argument that his objections to the admission of the guardian ad litem's report based upon Indiana Rules of Evidence 602, 701, 702 and 702(b)were erroneously overruled. The Court found that the father had posed no such objections at the pre-arbitration meeting at which time the admission of the report had been discussed and that the father had the opportunity to question the guardian ad litem extensively about the contents of her report, and to use statements therein in his questioning of other witnesses. Id. at 602. The Court also opined that, even if the guardian ad litem's report and testimony were erroneously admitted, sufficient evidence from other sources supported the parenting time determination. Id.

In Carrasco v. Grubb, 824 N.E. 2d 705 (Ind. Ct. App. 2005), *trans. denied*, the Court affirmed the trial court's order modifying custody of one of the children to the father where the guardian ad litem who had been appointed for the original dissolution had filed a report and recommended such a change. One of the issues raised by the mother on appeal was that the guardian ad litem participation in the post-dissolution proceedings was not authorized by law. The Court concluded that a guardian ad litem's responsibilities are not dependent upon the stage of the proceedings, and in seeking a change of custody of one of the children, the guardian ad litem properly participated in the proceedings and was acting in the child's best interests. Id. at 710-11. The Court noted that: (1) IC 31-15-6-4 provides that a guardian ad litem is required to serve until excused by the trial court. See also Deasy-Leas v. Leas, 693 N.E. 2d 90, 93 (Ind. Ct. App. 1998); (2) IC 31-15-6-1 provides that in a dissolution action, a guardian ad litem may be appointed by the court "at any time"; (3) in accordance with IC 31-15-6-8, the trial court may order a guardian ad litem "to exercise continuing supervision over the child to assure that the custodial or visitation terms of an order entered by the court… are carried out as required by the court"; and (4) once the guardian ad litem is appointed his or her role defined in IC 31-15-6-3, and further explained in IC 31-9-2-50, is to represent and protect the best interest of a

child, and to provide the child with services requested by the court, including "researching, examining, advocating, facilitating and monitoring the child's situation." Id. at 709. The Court further noted that in Deasy-Leas, it had determined that the "guardian is a party to the proceedings and is subject to examination and cross examination" and accordingly the guardian ad litem is permitted "to present evidence regarding the supervision of the action or any investigation and report that the court requires of the guardian ad litem or court appointed special advocate." IC 31-15-6-7. Additionally, the Court held that, when the mother refused to sign the change of custody agreement to which she had previously agreed, the guardian ad litem had the authority to request a hearing in light of IC 31-15-6-8 which provides that a guardian ad litem shall continue to supervise the situation "to assure that the custodial or visitation terms of an order…are carried out…" Id. at 710. The Court rejected the mother's argument that the guardian ad litem was simply attempting to relitigate the trial court's award of custody. The Court noted that IC 31-17-2-21 permits a trial court to modify a child custody order if modification is in the best interest of the child and there has been a substantial change in one or more of the factors listed in IC 31-17-2-8, and that IC 31-17-4-2 authorizes the trial court to modify parenting time if the best interests of the child are served.

In Haley v. Haley, 771 N.E. 2d 743, 748 n.1 (Ind. Ct. App. 2002), a dissolution custody modification case, the mother challenged the CASA's testimony as being "odd and unsubstantiated." The Court declined to make a determination concerning the CASA's credibility but noted that it was highly important to point out that the trial court found apparent bias in the CASA's report and yet still ruled in favor of the father's custody modification petition.

Guardianship

In In Re Guardianship of Hickman, 811 N.E. 2d 843, 852 (Ind. Ct. App. 2004), *trans. denied*, an adult guardianship case, the Court affirmed the trial court's order awarding attorney fees from the estate for the guardianship petitioner's attorneys despite another party's argument that because a guardian ad litem had been appointed, the involvement of the guardianship petitioner was no longer necessary. The Court opined that a trial court is required to appoint a guardian ad litem to represent the interests of an alleged incapacitated person. The Court further stated that, unlike the guardian ad litem, a guardianship petitioner is not required to act in accordance with the incapacitated person's best interests. Because the guardianship petitioner's interests might have been different from the incapacitated adult's interests, the argument that attorney fees for the guardianship petitioner were unreasonable was without merit.

In a separate adult guardianship opinion, In Re Guardianship of Hickman, 805 N.E. 2d 808, 821-24 (Ind. Ct. App. 2004), *trans. denied*, the Court discussed whether the trial court had abused its discretion in admitting the guardian ad litem's testimony and report before an advisory jury. The Court noted that the dissolution of marriage statute, IC 31-17-2-12, permitted a guardian ad litem's report to be received in

evidence at the hearing and that the report may not be excluded due to hearsay and further that the guardian ad litem may testify and be subject to cross-examination. The Court also noted that the guardianship statutes contain no provisions regarding the admissibility of the guardian ad litem's recommendations. Id. at 823. The Court did not decide the issue, because it found that any error in admitting the guardian ad litem's testimony was harmless. The Court further stated, "[we] do not, however, mean to suggest that statements and other submissions from a guardian ad litem made before a nonadvisory jury are not completely subject to the rules of evidence for their admissibility." Id. at 824.

Paternity

The Court affirmed the trial court's orders regarding communication between the parents and parenting time as well as four other orders in In Re Paternity of G.R.G., 829 N.E. 2d 114 (Ind. Ct. App. 2005), a paternity parenting time and child support modification case. A guardian ad litem was appointed to represent the child. The guardian ad litem issued a report and recommendations and also testified. The father appealed the trial court's order that the parties communicate only in writing absent an emergency, alleging that the order was against the evidence presented at trial and was an abuse of discretion. The Court quoted the guardian ad litem's testimony and held that the evidence was sufficient to support the trial court's findings that the parents were unable to effectively communicate with each other, which supported the court's order that they communicate only in writing. Id. at 121. On appeal the father also argued that the trial court abused its discretion by not awarding the father parenting time on midweek evenings. The Court noted that the trial court's order stated, "Visitation is ordered pursuant to the Guardian Ad Litem's report, because it is the alternative to continued conflict of the parents." The Court opined that the trial court had not erred in entering the parenting time order in accordance with the guardian ad litem report because the order took into account the child's best interests. Id. at 123.

Termination of the Parent-Child Relationship

1. **Guardian Ad Litem/CASA Evidence**

The evidence presented through the guardian ad litem /CASA was noted by the Court in several opinions on termination of the parent-child relationship. Guardian ad litem/CASA evidence was not an issue on appeal.

In Castro v. State Office of Family and Children, 842 N.E. 2d 367 (Ind. Ct. App. 2006), *trans. denied*, the Court noted in its Facts and Procedural History that the trial court found that the CASA assigned to the child's case reported that the child was doing well in foster care and her current foster parents were considering adopting her. Id. at 371.

In In Re Invol. Termn. Of Par. Child Rel. A.H., 832 N.E. 2d 563 (Ind. Ct. App. 2005), the guardian ad litem issued a report in which she included information about the following: (1) the father believed he could control his anger and adequately parent

the children; (2) the guardian ad litem believed that because of his disorders, the father would not be able to adequately and safely parent the children; (3) the father could not control his behavior well enough to parent very provocative, special needs children; (4) the children's condition at the time of their various detentions; (5) the children's improvements made while outside the care of either parent. Id. at 566.

In In Re R.J., 829 N.E. 2d 1032 (Ind. Ct. App. 2005), the trial court's judgment terminating the father's parental rights was reversed because several of the court's findings were not supported by the evidence. With regard to the suitability of the father's housing, the Court noted that the CASA testified that, although she had never met the father or seen his apartment building, she had been in the apartment ten years ago and it was unsuitable for a child then. Id. at 1037.

In In Re A.I., 825 N.E. 2d 798 (Ind. Ct. App. 2005), *trans. denied*, the parents appealed the trial court's judgment terminating the parent-child relationship. They argued, inter alia, that there was no particularized evidence to support the finding that termination was in the child's best interest. The Court held that the trial court's finding that termination was in the child's best interest was supported by the evidence. Id. at 811. The Court noted the evidence of the child's CASA that she thought it was in the child's best interest to terminate parents' rights. Id.

In In Re D.L., 814 N.E. 2d 1022 (Ind. Ct. App 2004), *trans denied*, the guardian ad litem testified about the two children's relationship with their pre-adoptive parents, stating: (1) the children's interactions with pre-adoptive parents were very appropriate and loving and they "seemed like a natural family"; (2) both children were "doing good"; (3) the older child wanted to be with his mother but "was fine where he was if he couldn't go back home"; (4) permanency was important for the children and being "in limbo" was "not a healthy state for them to be in." Id. at 1025.

In In Re Termination of Relationship of D.D., 804 N.E. 2d 258 (Ind. Ct. App. 2004), *trans. denied*, the Court affirmed the trial court's judgment terminating the parent-child relationship despite the mother's claim that the order was clearly erroneous. The Court noted that the child's guardian ad litem had investigated the case by interviewing the child's former caretaker, the current foster parents, the OFC case manager and other service providers. The guardian ad litem had also visited the child at two different residences and at school and had attended a planning meeting for the child. The guardian ad litem recommended that termination of parental rights and adoption were in the child's best interests. Id. at 263-264.

In McBride v. County Off. Of Family & Children, 798 N.E. 2d 185 (Ind. Ct. App. 2003), the CASA, a pediatrician, testified that: (1) she had spent over two hundred hours on the case; (2) in her opinion termination was in the children's best interests; (3) the mother had been making decisions which endangered her children for over seven years; (4) the children had experienced multiple placements, don't feel safe with their mother, have had numerous removals from the mother's home and needed permanency. Id. at 193

In In Re W.B., 772 N.E. 2d 522 (Ind. Ct. App. 2002), the Court affirmed the trial court's judgment terminating the parent-child relationship between the parents and their youngest two children, despite the parents' claim that the evidence was insufficient to support the termination judgment. The parents' rights to five older children had been previously terminated. At the termination trial for the two youngest children, the CASA recommended termination and testified to the following: (1) she was also the CASA for the other children; (2) the older children had consistently made allegations of sexual abuse by both parents to her and to therapists and foster parents; (3) she found it difficult to believe that the claims of sexual abuse were not true; (4) the parents had lived at fourteen different places from the time of the oldest child's birth; (5) the parents had been evicted from six places while the older children had been living with them; (6) the parents and older children had occasionally stayed with relatives and had even slept on the street for a few nights. Id. at 526-528.

In In Re E.S., 762 N.E. 2d 1287 (Ind. Ct. App 2002), the CASA filed written recommendations with the trial court after the termination petition was filed stating that she was not sure what the decision regarding the child's welfare should be because visitation had not been tried to determine whether reunification was possible. Id. at 1291. The trial court's termination judgment was reversed due to insufficient evidence. Id. at 1292.

In Carrera v. Allen County OFC, 758 N.E. 2d 592 (Ind. Ct. App. 2001), the CASA Director testified that the mother was informed that her compliance with program directives was necessary for the child's return, yet she continued to refuse assistance. Id. at 596.

In In Re Invol. Term. of Parent-Child Rel., 755 N.E. 2d 1090 (Ind. Ct. App. 2001), the guardian ad litem and case manager testified that the foster mother had provided a safe and stable environment for the children and that the children had bonded with each other and their foster mother Id. at 1098.

In In Re D.J., 755 N.E. 2d 679 (Ind. Ct. App. 2001), the CASA testified that he had not seen any actual commitment on the mother's behalf to performing the tasks required for reunification and that she lacked enough tools to be a good parent. Id. at 682.

Practitioners are cautioned that no termination statute provides for the admission of a guardian ad litem/CASA report in termination proceedings. Instead of providing a report, the guardian ad litem/CASA should testify and present witnesses, if needed, according to the Indiana Rules of Evidence.

2. **Guardian ad Litem/ CASA Legal Role in Proceedings**

In In Re Invol.Term. of Parent-Child Rel., 755 N.E. 2d 1090 (Ind. Ct. App. 2001), the mother appealed the trial court's judgment terminating the parent-child relationship. Among the issues argued on appeal was the mother's assertion that the guardian ad

litem should not be a party to the appeal because she presented no evidence independent from the OFC and did not hold an independent position on appeal. The mother claimed that the guardian ad litem had not conducted an independent assessment of the children, did not conduct a true home study and did not conduct an investigation into the cause of the mother's problems. The Court opined that the mother had waived this issue because she raised it for the first time on appeal and had not objected to the guardian ad litem's appearance on the appeal nor to the guardian ad litem being a party at the termination hearing. Despite the waiver, the Court concluded that the guardian ad litem was a proper party to the appeal, citing both statutory authority (IC 31-35-2-7) and an appellate rule (Ind. Appellate Rule 17(A)). Id. at 1099. The Court opined that neither OFC nor the guardian ad litem were automatically disqualified because their interests converged. Id.